IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 52 of 2001
With
CRIMINAL APPEAL No. 214 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

PREMSINH PITHASINH - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :

Crimianl Appeal No. 52 of 2001

Ms. Sadhna Sagar, appointed by Legal Aid Committee for appellant

Mr. KP Raval, APP for respondent – State of Gujarat

Crimianl Appeal No. 214 of 2001

Mr. Anil C. Thakore for the appellant

Mr. KP Raval, APP for respondent – State of Gujarat

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/10/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in these two appeals under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 14.12.2000 rendered in Special Case No. 93 of 2000 by the learned Additional Sessions Judge, Banaskantha District at Palanpur. By the impugned judgment and order, the appellants of both the appeals (A-1 and A-2) have been convicted for the offences punishable under Section 18 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act, 1985' for short) and sentenced to suffer RI for ten years and fine of Rs.1 lakh and in default of payment of fine, S.I. for two years.

2. Briefly stated, the prosecution case as disclosed from the complaint and unfolded during trial, is as under:

2.1. On 16.3.2000, C.R. Kotak, PI Palanpur City Police Station, received a secret information that A-1 and A-2 were coming from Rajasthan carrying with them opium derivative for delivering it at Palanpur S.T. Bus Stand. The said information was reduced into writing and was also communicated to DSP Banaskantha. C.R. Kotak, PI Palanpur City Police Station, thereafter arranged a trap and requisition was made for procuring presence of two persons to act as panchas and accordingly panchas were called and preliminary panchnama was drawn at Palanpur City Police Station. Subsequently, after preparing the preliminary Panchnama, CR Kotak, PI Palanpur City Police Station, with the raiding party and panchas, went to Palanpur S.T. bus stand and kept a watch there. During their watch they found movement of A-1 and A-2 in a suspicious manner. A-1 was having a rexine bag on his shoulder and they were talking inter-se. A-1 thereafter handed over the rexine bag to A-2 and went to the

counter to inquire something. Thereafter he returned to A-2 and from him he took the rexine bag and again they started talking inter-se. Thereafter the members of the raiding party approached both the accused persons and introduced themselves as police officers and panchas and inquired about their name. Thereupon they introduced themselves. The person who was carrying rexine bag on his shoulder was A-1 and the other was A-2. They were informed that the police officers received secret information that they were carrying contraband article in the bag and, therefore, they want to search them. They were asked whether they would like to be searched in presence of a Magistrate or a Gazetted Officer to which they said 'No'. Thereafter PI Palanpur City Police Station searched them in presence of panchas and members of the raiding party. During their search, they found four plastic bags in the rexine bag which was carried by A-1 and on opening the four plastic bags they found some dark gray coloured substance in them. On smelling the substance, it was felt that the substance was extract of opium. Therefore both the accused were asked to show pass/permit for carrying the said substance but they did

not have any pass/permit for carrying the said article with them. Thereafter a merchant, MB Solanki, was called with a scale for weighing the contraband article and on weighing it in presence of panchas, it was found that the said substance was weighing 4 kg. and the value of the said substance was about Rs. 1 lakh. Thereafter from the contraband article, two samples of 50 grams each were taken and after completing the necessary formalities of seizing and sealing, it was handed over to the responsible officer of the Palanpur City Police Station and a detailed panchnama in that regard was also drawn. Thereafter the accused were arrested and they were interrogated. During the course of interrogation they gave name of A-3 who had allegedly entrusted the contraband article to them to deliver it at Palanpur. A complaint in respect of the aforesaid incident was lodged with Palanpur City Police Station vide CR No.II-64 of 2000 against A-1 and A-2 and another accused who had allegedly entrusted the contraband article to A-1 and A-2 for commission of offences punishable under Section 18 read with Section 29 of the NDPS Act, 1985 and investigation was put into motion. During the course of investigation, the sample of

the contraband article was sent to FSL for chemical analysis and on getting report from the FSL to the effect that the contraband article was Opium derivative, the accused were charge-sheeted in the Court of learned Additional Sessions Judge, Palanpur where it was registered as Special Case No.93 of 2000.

2.2. The learned Additional Sessions Judge, to whom the case was made over for trial, framed charge against A-1, A-2 and another accused person for commission of the offence punishable under Section 18 read with Section 29 of the NDPS Act, 1985, which was read over and explained to them. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial in Special Case No. 93 of 2000.

2.3. In order to bring home the charge levelled against the accused, the prosecution has examined in all eight witnesses and relied upon their oral testimonies, details of which have been given in paragraph 3 of the impugned judgment and order as under:

PW No.	Name	Ex No.
1	Naranbhai Kanjibhai Thakore	15
2	Chandubhai Rupaji Kotak (Complainant)	21
3	Kirtilal Laxmanbhai Pathiyar	33
4	Mahendrakumar Babulal Solanki	34
5	Mafatlal Halabhai	37
6	Kirtikumar Amichand	40
7	Dalabhai Arjanbhai Desai, PSI (Investigating Officer)	45
8	Nathekhan Soramkhan Ghasura, PSI (Investigating Officer)	50

2.4. To prove the culpability of the accused, the prosecution has also produced a number of documents and relied upon the contents of the same, the details of which are enumerated in para 4 of the impugned judgment and order.

2.5. After recording of the evidence of the prosecution witnesses was over, the learned trial Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by saying that they have been

falsely implicated in the case. However, they did not lead any evidence nor did they examine any witness in support of their defence.

2.6. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the trial court held that the complicity of A-1 and A-2 has been established as they were found with contraband article opium derivative at Palanpur S.T. Bus Stand and during the search on them in the presence of panchas the said contraband article was recovered which was weighed in presence of the panchas and after following necessary formalities envisaged under the NDPS Act, 1985, the samples were sent to the FSL for chemical analysis and the report of FSL in terms certified that the muddamal article sent for analysis was opium derivative which is prohibited under Section 8 (c) of the NDPS Act, 1985 and commission of such offence is punishable under section 18 of the NDPS Act, 1985 wheres complicity of the third accused, who is not before this court, was not established. He, therefore, vide judgment and order dated 14.12.2000 convicted A-1 and A-2 for commission of the offence

punishable under Section 18 read with Section 29 of the NDPS Act, 1985 and sentenced them to suffer RI for ten years and fine of Rs.1 lakh and in default of payment of fine, SI for two years, giving rise to these two Criminal Appeals at the instance of A-1 and A-2.

3. A-1, who has filed Criminal Appeal No. 52 of 2001 through jail, is represented by Ms. Sadhna Sagar, learned advocate appointed by Legal Aid Committee to assist him whereas A-2 has filed Criminal Appeal No.214 of 2001 through his advocate Mr. Anil C. Thakore. Both the learned advocates for the respective accused have made their submissions vehemently.

According to Ms. Sagar, the prosecution evidence suffers from so many contradictions. The prosecution has examined the members of the raiding party who have not followed the mandatory and statutory provisions contained in the NDPS Act, 1985 and therefore on account of non-compliance of the mandatory and statutory provisions of the NDPS Act, 1985, the prosecution evidence cannot be relied upon and cannot be

acted upon.

So far as the panch witnesses examined by the prosecution are concerned, she submitted that they were under pressure of police officers and the members of the raiding party. She also submitted that the place where both the accused persons (A-1 and A-2) were caught hold of was a public place and as such independent witnesses were available. However, the complainant has not recorded statements of independent witnesses and therefore, according to her, the impugned judgment and order of conviction and sentence deserves to be quashed and set aside and thereby the appeal filed by A-1 may be allowed and the A-1 may be acquitted with the offence with which he was charged. Therefore, she urged to allow Criminal Appeal No. 52 of 2001 filed by A-1.

Mr. Anil C. Thakore, learned advocate of A-2, who has filed Criminal Appeal No. 214 of 2001, contended that it is not proved that A-2 was in conscious possession of the contraband article opium derivative. He was simply a by-stander at the S.T. Bus Stand near A-1. The fact that

A-1 and A-2 both belong to Rajasthan *ipso facto* cannot lead to a conclusion that A-2 had the knowledge that in the rexine bag which A-1 was carrying and which was handed over to him for a few minuets there was contraband article opium derivative and, therefore, he urged that there is no evidence against A-2 to show that A-2 was in conscious possession of the contraband article opium derivative and he contended that Criminal Appeal No. 214 of 2001 filed by A-2 deserves to be allowed and the judgment and order of conviction and sentence passed by the trial court deserves to be quashed and set aside and A-2 may be acquitted of the offence with which he was charged. Therefore, he urged to allow Criminal Appeal No. 214 of 2001 filed by A-2.

4. Mr. KP Raval, learned Additional PP for the respondent – State of Gujarat in both the appeals, submitted that by voluminous evidence produced by the prosecution, the complicity of both A-1 and A-2 is proved beyond reasonable doubt. Both of them were found at S.T. Bus Stand Palanpur. A-1 was carrying with him a rexine bag which he had handed over to A-2 for a few minutes

when he went to inquire something at the counter and thereafter he had taken it back from A-2 and, therefore, A-2 had also knowledge about the contraband article present in the rexine bag. According to him, so far as A-1 is concerned, the contraband article was admittedly present in the rexine bag which he was carrying with him. According to him, both A-1 and A-2 were rightly convicted and sentenced by the trial Court and, therefore, the impugned judgment and order does not warrant any interference of this Court in these appeals. He, therefore, urged to dismiss both the appeals.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS cases, this court has examined the entire evidence

on record for itself independently of the learned trial Judge and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned trial Judge has rightly recorded the order of conviction and sentence.

6. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

7. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

“The Statement of Objects and Reasons of the NDPS

> Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

8. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the

observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Inspector during the course of search of the accused and seizure of the muddamal, contraband article, opium derivative and the trial court has considered the evidence in proper perspective and rightly recorded the order of conviction and sentence.

9. In this connection, we shall first refer to the oral testimony of P.W.2, Chandubhai Rupaji Kotak, Police Inspector, the complainant, Ex.21. The complaint filed by him has been produced at Ex.22. He has, inter alia, testified that he received secret information on 16.3.2000 when he was on duty as Police Inspector at Palanpur City Police Station. On receipt of the said secret information, he noted it down in the station diary. As per the said information, A-1 and A-2 were to come at Palanpur S.T. Bus stand with contraband article to deliver it at Palanpur. He has also conveyed the said information to

DSP Banaskantha and made entry in the station diary in this regard. Thereafter he made necessary arrangement for laying a trap with the help of the members of the raiding party and panchas. He has testified as to how both the accused were caught hold of and from A-1 contraband article opium derivative was recovered. He has also testified that he saw A-1 handing over the rexine bag to A-2 when he went to the counter of the S.T. bus stand to inquire something. Thereafter again on returning from the counter A-1 took the said bag from A-2. Thereafter both of them were intercepted and in the presence of panchas and members of the raiding party, both A-1 and A-2 were searched and from the rexine bag the contraband article opium derivative was recovered. Thereafter the contraband article was seized and sealed in presence of the panchas. He has also stated that all the necessary formalities envisaged under the NDPS Act, 1985 have been adhered to and complied with. According to him, admittedly the bag wherein contraband article was concealed was with A-1 at the relevant time. Ultimately, with the responsible officer the same was forwarded to FSL for analysis. Nothing substantial has

been brought out from his evidence during cross-examination which would impeach his credibility at least so far as A-1 is concerned.

10. Thereafter the prosecution has examined P.W.5, Mafatlal Halabhai, Writer Head Constable of Palanpur City Police Station, Ex.37, P.W.6, Kirtikumar Amichand, Unarmed Police Constable, Ex.40, P.W.7, Dalabhai Arjanbhai Desai, PSI, Investigating Officer, Ex.45 and P.W.8, Nathekhan Sorambhai Ghasura, PSI and Investigating Officer, Ex.50. A close scrutiny of the evidence of the afore-mentioned witnesses, it is seen that they have deposed what role they performed and we find no reason to disbelieve their oral testimony.

11. The prosecution has also relied upon the evidence of P.W.1, Naranbhai Kanjibhai Thakore, Ex.15 and P.W.3, Kirtilal Laxmanbhai Pathiyar, Ex.33 - panch witnesses. They have also supported the prosecution case with regard to the fact that both the accused were found at ST Bus Stand, Palanpur, with contraband article and from A-

1 contraband article was recovered and they have also supported the prosecution case with regard to seizure and sealing of the contraband article opium derivative. The prosecution has also relied upon the evidence of P.W.4, Mahendrakumar Babulal Solanki, who has weighed the contraband article on his scale, at Ex.34. He has also supported the prosecution case.

12. A close scrutiny of the evidence of the prosecution witnesses in its entire width and breadth, so far as A-1 is concerned, the evidence is consistent to the effect that A-1 was found with rexine bag wherein contraband article opium derivative was concealed and in the presence of panchas and members of raiding party it was recovered from him. From the perusal of the documents on record, it is evident that C.R. Kotak, P.I. Palanpur has observed and strictly complied with the safe-guards under the statute and followed all the statutory provisions contained under the NDPS Act, 1985.

13. Ms. Sadhna Sagar, learned advocate of A-1, has feebly tried to point out some discrepancies in the

prosecution case. However, these discrepancies are very weak and not at all fatal to the prosecution case. Therefore, we find no reason to discard the evidence of the prosecution witnesses and according to us, the complicity of A-1 is proved beyond reasonable doubt.

14. So far as A-2 is concerned, admittedly, the rexine bag was not found from him. It is true that for some minutes the bag was handed over to him by A-1 when he went to the counter to inquire something and on returning from the counter, A-1 took the bag back from A-2. The fact of handing over the bag for a couple of minutes to A-2 is not sufficient to show that A-2 had the knowledge that the rexine bag which A-1 was handed over to him contained contraband article opium derivative. Therefore, a doubt is raised whether A-2 was aware that in the rexine bag handed over to him by A-1 was containing contraband article opium derivative.

15. **In the case of <u>State of Punjab V/s. Balkar Singh and another, (2004) 3 S.C.C. 582,</u> the accused were**

alleged to have been found present at the place where about 100 bags of poppy were recovered. They were sitting on such bags and they have failed to give any satisfactory explanation for being present at that place. The The Supreme Court held that mere being found to be present at the place where the poppy husk bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy husk bags.

16. **In the case of Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608, the Supreme Court has acquitted the accused No. 2 who was travelling in an auto-rickshaw by holding that no material was produced to establish that the accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and**

hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the auto-rickshaw was not sustainable.

17. **In the case of Narcotics Control Bureau, Jodhpur V/s. Murlidhar Soni and others, (2004) 5 S.C.C. 151, the Supreme Court was concerned with a case where accused's father (since died) was carrying a cloth bundle containing contraband, and the role of the accused was only to take his father on his scooter to the place where they were allegedly arrested. There was no evidence showing that accused had knowledge that the bundle contained any contraband articles. In absence of any material showing conscious possession of the contraband by the accused and the accused's father being dead, it was held that accused cannot be said to be in possession of any contraband articles and hence, his conviction under Section 21 was rightly set aside by the High Court. The Court was also in agreement with the finding of the High Court that the**

statements of the accused persons have been obtained by the Prosecuting Agency under duress.

18. Applying the principals laid down by the Supreme court in the above referred to three judgments to the facts of instant case, it is true that A-2 was with A-1 at Palanpur ST Bus stand and for temporary period A-1 had handed over the rexine bag to A-2 when he went to the counter to inquire something and on returning from counter, A-1 took the bag back from A-2. Therefore, it cannot be deduced that A-2 had knowledge about presence of contraband article in the rexine bag handed over to him by A-1 and there is no evidence to conclude that A-1 had any relation with A-2 and hence A-2 cannot be connected with the crime simply on the basis that the police had received information that two persons were coming from Rajasthan to Palanpur for delivery of the contraband article opium derivative at Palanpur. It is also to be noted that even according to the prosecution case, so far as A-2 is concerned, his role in regard to the bag containing contraband article opium derivative was

only for a temporary period from the time A-1 had handed over the bag to A-2 when A-1 went to the counter to inquire something till he returned from the counter as immediately on coming back from the counter, A-1 collected the rexine bag from A-2. It is true that both A-1 and A-2 belong to Rajasthan and were found at Palanpur ST Bus stand but that fact itself is not sufficient to establish that A-2 had knowledge that the bag which A-1 had handed over to him for a few minutes contained contraband article opium derivative. Therefore, in our opinion, since the prosecution has not placed any material on record to show the relation between both of them and the conscious possession of the bag containing contraband article opium derivative so far as A-2 is concerned, complicity of A-2 is not established and, therefore, A-2 deserves benefit of doubt.

In sum and substance, conscious possession of contraband article opium derivative with A-2 is not established beyond reasonable and, therefore, this court deems it expedient to accord benefit of doubt to A-2 and

the resultant effect of this conclusion would be that the impugned judgment and order of conviction and sentence of A-2 for commission of offence under section 18 read with Section 29 of the NDPS Act, 1985 deserves to be quashed and set aside by allowing the Criminal Appeal No.214 of 2001 filed by A-2 and thereby acquitting him of the offence with which he was charged.

19. For the foregoing reasons, Criminal Appeal No.52 of 2001 filed by A-1 fails and accordingly it is dismissed. The conviction and sentence imposed on A-1 is confirmed and maintained, however, with a slight modification that in default of payment of fine of Rs.1 lakh, the sentence to suffer SI for two years shall stand modified and instead of SI for two years, he shall suffer RI for one year in default of payment of fine.

So far as Criminal Appeal No.214 of 2001 filed by A-2 is concerned, the appeal is allowed, the result of which is that the impugned judgment and order of conviction and sentence for the offence punishable under Section 18

read with Section 29 of the NDPS Act, 1985 is quashed and set aside and he is acquitted of the offence with which he was charged. A-2 is in jail. Therefore, he is ordered to be set at liberty forthwith if he is not required in connection with any other case. Fine, if any paid by him, shall be refunded to him.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

...

(karan)